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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU,

Petitioner,

v.

ALAN LIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition ("Br. Opp.") seeks primarily to obscure the conflict between the Second Circuit's decision in this case and other cases, particularly those decided since *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), both by misstating the conflicting cases and by maintaining, repeatedly but incorrectly, that New York Business Corporation Law ("BCL") § 630 is not a collection statute of general application but one that imposes a primary obligation to fund ERISA plans and applies to ERISA plans exclusively.

(a) Respondent points to a recent New Jersey case, *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Constr. Co.*, 287 N.J. 561, 691 A.2d 339 (1997), as if that case were consistent with the Second Circuit decision here. *See* Br. Opp. at 4 (*L.B.S. Constr. Co.* "[found] that ERISA preempted the state law action brought against sureties to recover on payment and performance bonds issued under the New Jersey Public Works Bond Act, upon the contractors' failure to make contribution payments to various benefit funds."). In fact, *L.B.S. Constr. Co.* held the state statutory bonding requirement *not* preempted by ERISA (287 N.J. at 561), and did so on bases that cannot be squared with the Second Circuit's analysis in this case. In particular, *L.B.S. Constr. Co.* specifically approved the understanding of the Appellate Division opinion in the same case, quoted in our Petition (at 14), that the more recent ERISA preemption cases concerning collection of delinquent contributions from ERISA plans have generally held the state causes of action non-preempted. 287 N.J. at 568. *See also Petition for Writ of Certiorari* (*Pet.*) at 14; *Ironworkers Dist. Council of the Pacific Northwest v. Woodland Park Zoo Planning & Development,* No. 38165-2-I, 1997 Wash. App. LEXIS 1461, at *15 n.2 (Wash. Ct. App. Sept. 2, 1997) (holding a state statute requiring general contractors to provide a bond to protect workers' pay, including fringe benefit contributions, on public works projects, preempted because required to do so by an earlier Washington case, *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wash. 2d 565 (1994), but noting that "other jurisdictions, applying the *Travelers* analysis, have since determined that similar statutes are not preempted by ERISA," citing, *inter alia, Hawai'i Laborers' Trust Funds v. Maui Prince Hotel,* 81 Haw. 487, 918 P.2d 1143 (1996) and *L.B.S. Constr. Co.*)

L.B.S. Constr. Co., then, far from supporting the result reached by the Second Circuit in this case, is a state su-

preme court opinion inconsistent with that result and with the Second Circuit's reasoning, and sharpens the need for plenary review.

(b) More generally, respondent repeatedly attempts to distinguish the cases we cited in the Petition as conflicting with the Second Circuit's decision in this case on the basis that, unlike those cases, this one involves a statute, BCL § 630, that is not a statute of general application but one that "requires the existence of an ERISA plan as an element of an action brought thereunder." Br. Opp. 5; *see also id.* at 4 (distinguishing *L.B.S. Constr.* because the statute in that case "was a law of general applicability that functioned without any reference to ERISA" and existed for many years before Congress adopted ERISA); *id.* at 5 (distinguishing *Seaboard Surety Co. v. Indiana State District Council of Laborers Health and Welfare Fund,* 645 N.E. 2d 1121, 1127 (Ind. App. 1995) because "the state law did not refer to benefit plans nor single them out for special treatment"); *id.* at 6 (*Hawai'i Laborers Trust Funds* involved not a "statute[] that single[s] out ERISA employee welfare benefit plans" but a "statute[] of general applicability that merely provide[s] a remedy to collect on a judgment on behalf of a plan.")

In fact, BCL § 630, the most recent incarnation of century-old New York provisions for the collection of unpaid employee compensation from shareholders (*see, e.g., Coffin v. Reynolds,* 37 N.Y. 640 (1868)), on its face applies to *"all* debts, wages or salaries due and owing to any . . . laborers, servants or employees," and defines "wages or salaries" as *"all* compensation and benefits payable by an employer to or for the account of the employee. B.C.L § 630 (emphasis added). There is no reference in the statute to ERISA plans as such. And, while the statute does amplify the general definition by specifying that it includes but is not limited to "salaries, overtime, vacation, holiday and severance pay; *employer contributions to or payments of insurance or welfare benefits; employer con-*

tributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee," (emphasis added), the listing of employer contributions to welfare and pension funds, along with other forms of employee compensation, far from singling out such contributions for special treatment simply confirms that benefit plan contributions are *not* to be treated differently from the other forms of compensation also listed.

Thus, an unpaid judgment for ordinary cash wages can be collected from a shareholder under BCL § 630, as can unpaid vacation or holiday or severance pay that is not provided through an ERISA plan. *See Massachusetts v. Morash,* 490 U.S. 107 (1988); *Fort Halifax Paper Co. v. Coyne,* 482 U.S. 1 (1987). In short, it is simply not true that BCL § 630 "requires the existence of an ERISA plan as an element of an action brought thereunder." Br. Opp. at 5. And a mere mention of benefit plans in order to clarify that they are *not* singled out for special treatment does not alone give rise to ERISA preemption. *California Div. of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.,* 117 S. Ct. 832, 838 (1997) (a "reference" to an ERISA plan results in preemption only "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation."); *see United Wire, Metal and Machine Health & Welfare Fund v. Morristown Memorial Hosp.,* 995 F.2d 1179, 1192 n.6 (3rd Cir.), *cert. denied,* 510 U.S. 944 (1993) ("[F]or example, a state statute providing that 'no employer, including an ERISA plan, shall discriminate on grounds of race or gender' would not be preempted, despite its reference to an ERISA plan."); *Thikol Corp. v. Roberts,* 76 F.3d 751, 758 (6th Cir. 1996), *cert. denied,* 117 S.Ct. 2448 (1997).[1]

[1] Indeed, to paraphrase the New Jersey Supreme Court in *L.B.S. Const.*, finding BCL § 630 preempted as applied to contributions to ERISA plans

(c) In a further attempt to distinguish the conflicting cases, respondent maintains that BCL § 630 is not simply remedial, but imposes a primary obligation upon shareholders to make benefit contributions. Br. Opp. at 6 (unlike the mechanics' lien statute in *Hawai'i Laborers Trust Funds*, BCL § 630 does not "merely provide a remedy to collect on a judgment on behalf of a plan.") Again, this suggestion is simply wrong: BCL § 630 on its face provides a cause of action against shareholders, but *only* "within 90 days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services rendered." Pet. at 4. Similarly, the mechanics lien cause of action held valid under ERISA in *Hawai'i Laborers Trust Funds* proceeded against a party that had *no* direct obligation under ERISA to make contributions, and arose, as a matter of law, once the party that did have a direct obligation failed to satisfy that duty. 81 Haw. at 491.

There is, consequently, no cognizable distinction for ERISA preemption purposes between the mechanics' lien cause of action upheld in *Hawai'i Laborers Trust Funds* and the BCL § 630 cause of action here at issue. Both statutes are means of collecting benefit plan contributions from a third party when the entity obligated to make the payments has failed to do so. The Hawaii and New York statutes differ only in the identity of the third party required to pay in that circumstance.

(d) Respondent *does* recognize that the New York Court of Appeals opinion in *Sasso v. Vachris*, 66 N.Y.2d

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would lead to paradoxical results. For example, employees paid solely in cash that covered their benefit needs would be able to recover against the [shareholders], but those paid in a combination of cash and fringe benefits would not be able to recover the latter. *Cf. Keystone [Chapter, Associated Builders & Contractor, Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994)], at 959-60 (noting that allowing preemption under similar circumstances would create "disincentive" against awarding benefits). [148 N.J. at 575.]

28, 484 N.E.2d 1359 (1985) directly conflicts with the decision of the Second Circuit in this case, and can point to no later case in the New York courts to the contrary concerning the validity of BCL § 630 (because there is no such case). Br. Opp. at 2. Respondent maintains, instead, that the Second Circuit correctly concluded that *Sasso* was wrongly decided. *Id.*, at 2-4.

For reasons explained in the petition, we strongly disagree with that assessment.[2] Pet. at 10-12. For present purposes, however, the existence of the conflict, rather than its proper resolution, is the more salient point. It is precisely to resolve the question whether it is the New York Court of Appeals or the Second Circuit that has correctly analyzed the application of ERISA's preemption provisions to BCL § 630 that a grant of certiorari is necessary. As long as the conflicting decisions both continue in effect, the state but not the federal courts in New York will require shareholders of closely held corporations to pay unsatisfied judgments for unpaid employer contributions to benefit plans.

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[2] In particular, as respondent notes, the Second Circuit rejected *Sasso*'s reliance on the legislative history of the 1980 amendments on the basis that *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) estabilshed a generally applicable rule preempting any state statute that augments any ERISA remedy. Br. Opp. at 3. While it is true that "*Ingersoll-Rand* . . . did not distinguish between state law causes of action which impact on the original 1974 ERISA provisons and those that impact upon the 1980 amendments . . ." (Br. Opp. at 3), it is also true that *Ingersoll Rand* did not involve any ERISA provision amended in 1980, and therefore had no reason to consider the impact of the 1980 amendments. And, since a finding of conflict preemption depends ultimately upon Congressional intent, the legislative history of ERISA § 515, indicating a Congressional intent to preserve state law actions to collect delinquent contributions *is* pertinent, as *Sasso* indicated, in determining whether such actions are preempted. *See also Hawai'i Laborers' Trust Funds*, 81 Haw. at 499-500 (stressing the legislative history deemed irrelevant by the Second Circuit.)

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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